No. 89-1314

(3)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

ROSSCO HOLDINGS INCORPORATED,
a California Corporation
d.b.a. QUAKER CORPORATION,
MICHEL T. GHOSN,
Petitioners,
VS.
STATE OF CALIFORNIA,
CALIFORNIA COASTAL COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION THREE

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the California Court of Appeal, applying state law, correctly rejected petitioners' challenge to the State coastal zone boundary, given that the boundaries of the coastal zone have been specifically defined by the California Legislature by adopted maps and petitioners' properties concededly lie within the boundaries as depicted on those maps.

(2) Whether the California Court of Appeal correctly refused to decide a claim of constitutional inadequacy in the Coastal Commission's adjudicatory hearing process, given that the issue was never raised before the trial court or upon a proper record when finally presented to the appellate court.

(3) Whether the California Court of Appeal correctly decided, applying state law, that petitioner Quaker waived its right to attack the validity of conditions imposed on a grant of subdivision approval and sue for damages, given that Quaker concededly accepted the benefits of the permit issued and complied with the conditions.

(4) Whether the California Court of Appeal correctly rejected Quaker's suit for damages under principles of res judicata, given that Quaker failed to attack in administrative mandamus the validity of the adjudicatory decision approving its subdivision request or the conditions imposed thereby.

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October Term, 1989

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a California Corporation
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MICHEL T. GHOSN,
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vs.

STATE OF CALIFORNIA,
CALIFORNIA COASTAL COMMISSION,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents State of California and California Coastal Commission respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the California Court of Appeal in this case. That opinion is reported at 212 Cal.App.3d 642 (1989).

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). However, jurisdiction is lacking for three reasons.

First, petitioners' state coastal zone boundary challenge proceeded in the courts below on pure issues of state law. The assertion that the State Legislature's manner of including petitioners' properties in the coastal zone violated due process was neither raised nor decided in the state court proceedings below.

Second, the issue of claimed constitutional inadequacies in the hearing process of the respondent Commission was not decided in the proceedings below because it was never raised before the trial court and because no proper record was presented when it was finally raised in the State Court of Appeal.

Finally, review of the remaining federal questions asserted is foreclosed because the Court of Appeal, in deciding that petitioner Quaker waived its right to attack the validity of conditions imposed on its subdivision approval and sue for damages, proceeded on an independent and adequate state ground sufficient, by itself, to maintain the judgment below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are pertinent to this case, as well as sections 17 and 30103(a) of the California Coastal Act of 1976 (Cal. Public Resources Code, § 30000 et seq.).

STATEMENT OF THE CASE

Petitioners Rossco Holdings Inc. (dba "Quaker Corporation") and Michel Ghosn ("Ghosn") own three

unrelated, undeveloped properties in the Malibu-Santa Monica Mountains area of the County of Los Angeles, California. Quaker owns two of those properties, the 272-acre "Mulholland" property and the 102-acre "Piuma" property. Ghosn owns the third, the 160-acre "Ghosn" property.

In July 1983, the California Coastal Commission ("Commission") approved Quaker's application for a 22-lot subdivision of the Piuma property. The approval was made subject to conditions requiring recordation of an offer to dedicate an open space easement and the purchase of 21 transferable development credits ("TDCs") to offset the cumulative effects associated with the new lots created. Though not disclosed by the complaint filed or petition to this Court, the conditional approval enabled the Commission to approve a 22-lot subdivision, rather than a subdivision of eight lots as permitted by the Area Plan. Resps. & Cr.-Apps' Reqt. for Jud. Notice, Exh. 1. Quaker accepted the coastal development permit authorizing the subdivision which was issued in July 1985 and thereafter, but prior to filing this suit, it fully satisfied both conditions.[1/]

1. The petition states the TDCs were purchased from an "environmental group." Pet. at 2. In fact, they were purchased from a non-profit entity implementing a lot consolidation program in the Santa Monica Mountains established by another state agency, the California Coastal Conservancy.

The petition also erroneously states that "[a]t the time this lawsuit was filed, Quaker was still making installment payments on the $297,500 exaction, while the required 'offer to dedicate' its landholding was still pending but had not yet [sic] accepted by a government entity . . . ." Pet. at 3. The complaint,

On September 29, 1987, some four years after the Commission's conditional approval, Quaker and Ghosn jointly filed the underlying action. Although several different claims are stated, only two remain pertinent here. The first, a claim for damages, mandate and declaratory relief, involves a challenge by both Quaker and Ghosn to the location of the State "coastal zone" boundary established by the California Legislature in enacting the Coastal Act of 1976. The second concerns a challenge by Quaker to the Commission's 1983 approval of its Piuma subdivision. It seeks interim damages under various theories based on a claim that the conditions of approval Quaker accepted constitute an unlawful taking in violation of the "Just Compensation" Clause of the Fifth Amendment.

In November 1987, a coalition of 16 homeowner groups intervened in the action to oppose the relief sought by the complaint.

On January 5, 1988, respondents demurred to all causes of action pleaded in the complaint. On April 27, 1988, with one exception, the trial court sustained respondents' demurrers without leave to amend.

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which was filed in September 1987, alleged that, as to the TDC requirement, "[a]ll of said sums have been paid by QUAKER to the Mountains Restoration Trust, with the last and final payment paid under protest in or about August 1987." Joint Appendix ("Jt. App.") #6, Complaint ¶ 64 (A). As to the dedication requirement, Quaker alleged that it "has recorded an offer to dedicate an open space easement but the same has not yet been accepted by a government [sic] and thus the offer remains open and pending." Ibid., ¶ 64 (B).

Petitioners appealed from the order of dismissal and judgment. The Commission filed a cross-appeal to preserve its ability to argue the one ground for demurrer overruled by the trial court as a further reason for affirmance.

In a published opinion filed on July 26, 1989, the California Court of Appeal for the Second Appellate District, Division Three, reversed on the Commission's cross-appeal and affirmed the judgment, as modified, holding, as pertinent here:

(1) The boundaries of the State's "coastal zone" have been specifically defined by maps adopted by the California Legislature, and petitioners' properties concededly lie with the boundaries as depicted on those maps;

(2) Under settled state law, by accepting the benefits of the "Piuma" permit and complying with the conditions imposed, Quaker waived its right to later attack assertedly "improper" conditions;

(3) Apart from waiver, Quaker's failure to timely petition for administrative mandamus to invalidate the conditions, under applicable state court procedures and principles of res judicata, precludes suit in inverse condemnation seeking interim damages; and

(4) Quaker failed to present a proper record by which the Court might review the constitutional adequacy of the State's administrative mandamus process relative to the Commission's 1983 decision on Quaker's "Piuma" permit.

On November 2, 1989, the California Supreme Court denied a petition for review.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT LACKS JURISDICTION OVER THE QUESTION CONCERNING THE STATE COASTAL ZONE BOUNDARY BECAUSE IT WAS NEITHER RAISED NOR DECIDED IN THE STATE COURT PROCEEDINGS BELOW

The petition attempts for the first time to convert what was a pure question of state law before the state courts into a federal question. Petitioners Quaker and Ghosn below jointly challenged the location of the State "coastal zone" boundary in the area of their respective properties in the Santa Monica Mountains. There was no dispute that the coastal zone boundary maps adopted by the California Legislature show their properties to be well within the coastal zone. Instead, petitioners contended that the State Legislature intended the boundary, as defined in the Coastal Act of 1976, to be controlled by a topographic ridgeline (seaward of their properties) and not the maps, and that the Commission's staff misled the Legislature by preparing the maps in violation of statute in order to improperly expand the agency's jurisdiction.

The petition now reframes the issue in an effort to pose a federal question. Petitioners assert they were denied due process because they received no hearing or

notice from the State Legislature before their properties were included in the coastal zone. While the argument offered in the petition addresses almost exclusively state court issues of statutory interpretation, the due process argument reveals itself for the first time at the end of the argument in two brief sentences. Pet. at 22.

This Court has consistently refused to decide federal constitutional questions raised before it for the first time on review of a state court decision. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). For jurisdiction to obtain, the question presented must have been raised and decided in the state court below. Hill v. California, 401 U.S. 797, 805 (1971).

The due process question now asserted was never raised, briefed, argued or passed upon in the trial or appellate courts. It is, therefore, not properly reviewable in this Court.

Even addressing the argument, moreover, it has no merit. A host of cases squarely reject any constitutional right of notice and hearing preceding the enactment of legislation. Bowles v. Willingham, 321 U.S. 503, 519 (1944); Bi-Metallic Co. v. Colorado, 239 U.S. 441, 445 (1915).

Finally, the State Court of Appeal correctly decided the state issues argued by petitioners. The California "coastal zone" boundary was established by the State Legislature over 14 years ago as part of its enactment of the California Coastal Act of 1976. California Public Resources Code section 30103, subdivision (a), defines the State "coastal zone" as follows:

> "'Coastal zone' means that land and water area of the State of California from the Oregon border to the border of the Republic of Mexico, specified on the maps identified and set forth in Section 17 of that chapter of the Statutes of 1975-1976 Regular Session enacting this division, extending seaward to the state's outer limit of jurisdiction . . . and extending inland generally 1,000 yards from the mean high tide line of the sea. In significant coastal estuarine, habitat, and recreational areas it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less and in developed urban areas the zone generally extends inland less than 1,000 yards . . . ." (Emphasis added.)

Section 17 of chapter 1330 of the California Statutes of 1976, as amended by section 29 of chapter 1331 of the Statutes of 1976, in turn provides:

> "The coastal zone, as generally defined in Section 30103 . . . shall include the land and water areas as shown on the map prepared by the California Coastal Zone Conservation Commission titled "California Coastal Zone" dated August 11, 1976, and on file with the Secretary of State." (Emphasis added.)

The argument below, and again here, is that the maps are invalid because the State Legislature intended the boundary to be controlled by a topographic ridgeline and not the maps. The flaw in the argument is that it ignores the plain language of Public Resources Code section 30103, subdivision (a), and, in particular, section

17. Read together, these provisions refer to the coastal zone as generally described in words and specifically defined by the maps. Applying settled rules of statutory construction that the specific must control over the general (Estate of Kramme, 20 Cal.3d 567, 576 (1978)), the Court of Appeal concluded that "the boundary established by the maps must preponderate over the verbal description in the statute." Pet. at A-10. The plain language of the two provisions, two failed legislative attempts to modify the boundary in the manner urged by petitioners, and an opinion by the State Attorney General reaching the identical conclusion on the very issue some nine years earlier in 1980 readily confirm that the Court was correct in its conclusion.

II.

THE COURT LACKS JURISDICTION CONCERNING ASSERTED CONSTITUTIONAL INADEQUACIES IN THE COMMISSION'S HEARING PROCESS BECAUSE THE ISSUE WAS NEVER RAISED BEFORE THE TRIAL COURT OR RAISED UPON A PROPER RECORD WHEN FINALLY PRESENTED TO THE COURT OF APPEAL

The second question presented in the petition is whether there is some constitutional inadequacy in the adjudicatory hearing process conducted by the Commission. The Court of Appeal did not decide this question because it concluded that the issue was never raised before the trial court, that it proceeds from an administrative hearing on an unrelated permit matter,

and that it is unsupported by any record demonstrating a constitutional inadequacy in proceedings conducted by the Commission on the Piuma development.[2/] Pet. at A-17-19.) These same inadequacies in the record foreclose any determination of that question by this Court.

On appeal from the judgment, Quaker sought for the first time to have the Court of Appeal take judicial notice of a hearing before the Commission on an application to develop another property owned by it unrelated to proceedings on the Piuma property. Specifically, Quaker sought to introduce evidence from that matter that land use proceedings before the Commission lack cross-examination, the ability to subpoena witnesses, testimony under oath, a judicial officer to make rulings on evidentiary questions, or reasonable limitations on hearing time. From this, it argued that the "limited" record a landowner is able to create in a Commission proceeding unfairly restricts the matters which can be argued in mandamus and prevents proof of a taking.

The Court of Appeal rejected Quaker's judicial notice request, stating:

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2. The Court did observe, however, that "as far as can be determined in the absence of a proper record, the rules of chapter 5 of title 14 of the California Administrative Code would have afforded Quaker a fair opportunity to be heard and to place sufficient written material in the administrative record to provide an adequate basis upon which thereafter to seek administrative mandate respecting any taking asserted to have resulted from the Commission's ruling." Pet. at A-17; footnote omitted.

"Based upon the present record, it can only be concluded that any asserted inability on the part of Quaker to present its constitutional claim adequately in the context of a CCP section 1094.5 is self-inflicted, and not properly before this court because Quaker never bothered to create the necessary record. We have no transcript of the hearing before the Commission and no trial court record from which we might have found Quaker's claims had merit." Pet. at A-19.

Just as the record did not permit the California court to address the question, it fails to provide any factual setting or procedural posture from which this Court can determine the constitutional adequacy of Commission's 1983 proceedings on the "Piuma" approval. A federal question must be raised, presented and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings (Godchaux Co. v. Estopinal, 251 U.S. 179, 181 (1919); Beck v. Washington, 369 U.S. 541, 550-554 (1962)), and that includes raising the question before the trial court. Hulbert v. Chicago, 202 U.S. 275, 279-280 (1906). Since the issue was never timely or properly presented to the California courts, it falls well short of raising a properly reviewable federal question.

It bears emphasis, moreover, that the nature of the challenge placed here is much more focused than the very generalized argument offered by Quaker. It seeks to attack conditions imposed on a grant of permit. In determining whether a conditional dedication constitutes a "taking" under the Fifth Amendment, the question is whether the condition imposed "substantially advances a

legitimate state interest." Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 841 (1987). As the Court of Appeal observed: "[T]he present procedure for administrative mandate has not prevented landowners from proving conditions imposed by the Commission have been excessive or invalid." Pet. at A-18. For example, in Nollan the landowner protested before the Commission the imposition of a public access condition on approval of a beachfront residence, and ultimately successfully argued to this Court that the condition worked an unconstitutional taking. Id. at 837. Fundamental principles of judicial review require that any claim of constitutional infirmity in an agency's procedures proceed from a proper record. Here it does not, and thus the question does not qualify for review by this Court.

III.

REVIEW OF THE REMAINING FEDERAL QUESTIONS ASSERTED IS FORECLOSED BECAUSE THE DECISION OF THE COURT OF APPEAL THAT QUAKER WAIVED ITS RIGHT TO ATTACK ITS CONDITIONAL APPROVAL AND SUE FOR DAMAGES CONSTITUTES AN INDEPENDENT AND ADEQUATE STATE GROUND SUFFICIENT, BY ITSELF, TO MAINTAIN THE JUDGMENT BELOW

The primary issue addressed in the Court of Appeal decision concerned the propriety of Quaker's attempt to collaterally challenge the conditions placed on its 1983

"Piuma" permit approval by way of inverse condemnation. The Court held, applying settled state law, that Quaker waived its right to attack the conditions when it accepted the benefits of the permit and complied with the conditions. Pet. at A-13. That waiver constitutes an independent and adequate state ground supporting the judgment below. It precludes Quaker's belated attack on the permit conditions on any ground, including federal constitutional grounds. Black v. Cutter Laboratories, 351 U.S. 292, 297-298 (1956); Eustis v. Bolles, 150 U.S. 361, 364-370 (1893); Beaupre' v. Noyes, 138 U.S. 397, 401-402 (1891).

A. Under California Law, a Landowner Who Accepts a Permit and Complies with its Conditions Waives the Right to Assert the Invalidity of the Conditions and Sue the Issuing Public Entity for the Costs of Complying

Quaker below conceded that it has complied with the conditions imposed by the Commission upon development of its Piuma property. That it therefore waived its right to assert the invalidity of the conditions and sue for damages was compelled by well established state law and the facts presented on the face of the complaint.

Under California law, a landowner is barred from challenging a condition imposed upon the granting of a special permit if he has accepted the benefits afforded by the permit and has acquiesced in the condition by either specifically agreeing to the condition or failing to challenge its validity. County of Imperial v. McDougal, 19 Cal.3d 505, 510-511 (1977).

Pfeiffer v. City of La Mesa, 69 Cal.App.3d 74, 78 (1977) states the rule similarly:

> "It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them . . . If the conditions imposed by the city in their permit were invalid, Code of Civil Procedure section 1094.5 provided plaintiffs with the right and procedures to eliminate them. By declining to avail themselves of those procedures, plaintiffs cannot convert that right into a cause of action in inverse condemnation." (Emphasis added.)

Quaker argues a party may not be "required" to waive a constitutional challenge. Pet. at 13. That is not this case. Nothing in the record, pleaded or argued suggests Quaker was "required" in any manner to waive constitutional claims and accept the benefits of, and conditions placed upon, its subdivision approval. The waiver here was solely of its own making, as is clear from the allegations set forth in the complaint. The complaint concedes that Quaker was issued its coastal development permit for the Piuma development on July 23, 1985 and that it has since complied with the conditions imposed by the Commission. Jt. App. #6, Complaint ¶ 64. Specifically, it alleges that Quaker entered into a contract with the Mountains Restoration Trust, a quasi-public agency, to satisfy a requirement that it purchase 21 transferable development credits ("TDCs"), and that it made its last and final payment to comply with the Commission's conditional approval on or about August 1987, approximately a month before this suit was

filed. Id., ¶ 64A. Further, it alleges that it recorded the offer to dedicate an open space easement required as a condition of its permit approval. Id., ¶ 64B.

The State's Coastal Act contains a provision which specifically allows for judicial review of any final decision or action of the Commission in administrative mandamus.[3/] This procedure was well known to Quaker. As to the Commission's decision on Quaker's application to subdivide the Mulholland property, Quaker timely pursued administrative mandamus review to challenge the validity of that adjudicatory action. By contrast, as to its Piuma property, it simply elected not to pursue mandate review of the permit conditions imposed on its subdivision approval and accepted the benefits of the permit issued. Under the County of Imperial Pfeiffer rule, Quaker thus waived its right to later claim damages based on the alleged invalidity of those conditions.

The cases cited by Quaker neither support a contrary result nor elevate the issue to one of constitutional dimension. Nollan v. California Coastal Comm'n, supra, 483 U.S. 825, did not address or decide the waiver issue. Unlike Quaker in this case, the Nollans filed a timely suit in administrative mandamus challenging the access condition imposed on approval of their beachfront residence. No permit was issued to the Nollans, and

3. California Public Resources Code section 30801 provides in pertinent part: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission or a regional commission by filing a petition for a writ of mandate in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure, within 60 days after such decision or action has become final."

they did not comply with the condition. The Nollans therefore preserved their legal ability to challenge the permit condition imposed. It is true that "[w]hile the application was pending, the Nollans satisfied the condition on their option to purchase by tearing down the bungalow and building the new house and bought the property" (Id. at 829-830), but because the Nollans timely pursued their challenge to the Commission's access requirement, the Court nonetheless proceeded to address and invalidate it.

This case, McDougal, and Pfeiffer present a strikingly different situation from that in Nollan: in each the condition was accepted, the permit was issued, and no timely review in mandate, as required, was sought.

Neither is the narrow fact-based exception to waiver in Salton Bay Marina, Inc. v. Imperial Irr. Dist., 172 Cal.App.3d 914 (1985), applicable. There, as a condition of subdivision approval, plaintiffs entered into written agreements with the County not to sue the Irrigation District and to hold it harmless from any damages or injury caused by the rising of the Salton Sea. When plaintiffs' properties were thereafter flooded because of changes in the District's own management practices, they sued in inverse condemnation. On appeal, the court rejected application of the waiver rule for three reasons, none of which has any conceivable relevance here.

First, the court found the agreements void as against public policy because they exempted the District from liability without provision for recourse where the flooding was caused by the District's own negligence. Id. at 941. No factual parallel is provided here.

Second, the court concluded that the rule should not apply when the intent of the land use approval is not merely to regulate the development of land or to require a reasonable dedication, but to effectuate a taking without payment of compensation, as would have been the direct effect of the District's independent action there in causing arise in the level of the Salton Sea. Id. The conditions here were directed solely to the impacts of the subdivision approval applied for, and did not seek to immunize the Commission from liability from any actions that it might take independent of the permit proceeding.

Third, the court stated that before the estoppel doctrine may be applied, it is necessary that the condition's effects be readily apparent to the party to be estopped. Id. at 942. In Salton Bay Marina it was not. In the instant matter it obviously was, and Quaker has never argued it did not comprehend the effect of the conditions placed on approval of its request for a 22-lot subdivision.

Finally, Dept. of Trans. ex rel. People v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. App. 2 Dist. 1988), is of no assistance. It involves a collateral attack upon a void condition. In Amoco, the state Department of Transportation granted a permit allowing Amoco access to a state highway, but conditioned on the understanding that any improvement placed on the property could not serve to increase the value of the right of access when it was eventually terminated. The Illinois appellate court found the condition void because its purpose was solely to depress the property value in anticipation of future acquisition. 528 N.E.2d at 1024-1025. Amoco was therefore permitted to collaterally challenge its validity in

an eminent domain action later brought against it by the Department.

In this case, the power to impose both an open space requirement (Cal. Pub. Resources Code, §§ 30240, 30251; Paoli v. California Coastal Comm'n, 178 Cal.App.3d 544, 551-552 (1986)) and a transferable development credit condition to offset the cumulative effects associated with the grant of a subdivision permit authorizing new lots (Cal. Pub. Resources Code, §§ 30250, 30251) was well within the Commission's jurisdiction. Again, as conceded on the face of the complaint, Quaker fully complied with those conditions and accepted the permit issued. The Court of Appeal correctly decided, applying state law, that it unquestionably waived any right to collaterally attack the allegedly erroneous imposition of those conditions in inverse condemnation.

B. Apart from Waiver, the Court of Appeals Correctly Concluded that, Under Applicable State Court Procedure and Principles of Res Judicata, Quaker's Failure to Timely Challenge the Validity of the Conditions of its 1983 Permit Approval in Administrative Mandamus Foreclosed Any Later Suit for Damages.

While not necessary to affirmance of the judgment below, the Court additionally concluded that Quaker's failure to timely petition for administrative mandamus to invalidate the conditions, under applicable state court procedure and principles of res judicata, precluded suit in inverse condemnation. Pet. at A-15-16. The petition

contends this conflicts with the decision of this Court in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). However, Quaker gives First English a reading far beyond anything considered or decided by this Court. The Court of Appeal decision on this issue was correctly decided and is entirely consistent with both First English and well settled California law.

First English overruled the California Supreme Court's decision in Agins v. City of Tiburon, 24 Cal.3d 266 (1979), aff'd on other grounds, 447 U.S. 255 (1980), that a landowner may not maintain an inverse condemnation suit based on a "regulatory" taking and that his sole remedy in such an instance is to invalidate the regulatory action. The issue in First English concerned whether "the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment, . . . require[s] compensation as a remedy for 'temporary' regulatory takings -- those regulatory takings which are ultimately invalidated by the courts." (482 U.S. at 310; emphasis added.) The Court held (at 321-322):

> " . . . that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective . . .
>
> " . . . [W]e hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." (Emphasis added.)

First English establishes that a landowner indeed has a remedy in damages for a "temporary" taking -- by definition, a taking for a distinct period which terminates with a determination of invalidity. However, in so deciding, the Court neither addressed nor limited state court procedures for testing the validity of an adjudicatory land use decision in the first instance. Neither did it address the res judicata effect of a final adjudicatory administrative decision as to which an aggrieved party has elected not to seek judicial review. The latter, in particular, controlled the decision of the Court of Appeal in this case.

Quite clearly, an essential predicate to the interim damage remedy is a determination that the agency's decision is invalid such that the presumption of validity which ordinarily attaches to it is overcome and the "period" of the taking is determined. In California, administrative mandamus provides the vehicle for that determination in the case of adjudicatory decisions of administration agencies.[4/] Moreover, it fosters the early

4. California Code of Civil Procedure section 1094.5 provides for judicial review of the validity of a final administrative order by petition for writ of mandate to the superior court. Subdivision (b) of that provision states: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

disposition of interim damage claims.[5] Indeed, the expeditious mandamus procedure benefits both the landowner and government by ensuring that the validity of its adjudicatory land use decisions does not remain in limbo for years. Further, government is not forced to set aside substantial contingency reserves to cover the extended periods of time that might be associated with a potential "temporary" taking, absent such a reasonably short statute of limitations.[6]

Quaker confuses the notion of an "interim" regulatory taking with a permanent taking, where, as Quaker puts it, a government act may be valid and yet still require an award of just compensation. See, eg., Hurley v. Kincaid, 285 U.S. 95 (1931). In First English, however, this Court drew a clear distinction between the two remedies and stated that a "landowner has no right under the Just Compensation clause to insist that a 'temporary' taking

5. Statutes of limitation governing administrative mandamus matters are ordinarily quite brief (See, eg., Cal. Code Civ. Proc., § 1094.6(b) (90 days as to local government decisions); Cal. Pub. Resources Code, § 30801 (60 days as to Coastal Commission decisions)), and are usually treated as law and motion type matters providing for their prompt resolution. (Eg., Law Departments Policy Manual, Los Angeles Sup. Ct., Rules 421-436.)

6. On this issue, the California Court of Appeal in California Coastal Comm'n v. Superior Court (Ham), 210 Cal.App.3d 1488, 1496 (1989), aptly pointed out that "a property owner could delay nearly five years until the statute of limitations for an inverse condemnation action had almost expired, simply allowing his damages to accrue in the interim. In given cases and certainly in the aggregate, the financial burden on the state could be overwhelming."

be deemed a permanent taking." First English, 482 U.S. at 317. That is the prerogative of government once a court has determined the subject regulation is "invalid." Id. at 321.

First English involved an ordinance, the facial constitutionality of which was challenged on Fifth Amendment taking grounds. The Court did not consider the res judicata effect of a failure to challenge the validity of an adjudicatory action. This is equally true of the state court cases cited by Quaker; none involved adjudicatory action. In this case, the challenge placed is to the proceedings of an administrative agency which are distinctly adjudicatory, or "quasi-judicial," in nature. Patterson v. Central Coast Etc. Conservation Comm'n, 58 Cal.App.3d 833, 841 (1976); Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n, 57 Cal.App.3d 76, 83 (1976). Adjudicatory decisions made in this setting are entitled to a settled "presumption of regularity and legality of official action" (Cal. Evid. Code, § 664; DeLuca v. Board of Supervisors, 134 Cal.App.2d 606, 610 (1955)), and that presumption "is conclusive in the absence of contrary proof." Romero v. County of Santa Clara, 3 Cal.App.3d 700, 705 (1970). Indeed, under California law, a failure to seek judicial review of an adjudicatory administrative decision, including those made by the Commission, forecloses, on principles of res judicata, a party from later challenging the merits of that determination in a collateral proceeding. Monroe v. Trustees of the California State Colleges, 6 Cal.3d 399, 405-406 (1971); Stockton v. Dept. of Employment, 25 Cal.2d 264, 267-268 (1944); California Coastal Comm'n v. Superior Court (Ham), 210 Cal.App.3d 1488, 1496-1500 (1989); Knickerbocker v.

City of Stockton, 199 Cal.App.3d 235, 243-244 (1988). There is nothing novel in that rule. It is well recognized in the decisions of this Court. University of Tennessee v. Elliott, 478 U.S. 788, 796-799 (1986); United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966).

The landowner who follows the statutory mandate procedure and timely challenges an adjudicatory land use decision preserves his right under the Fifth Amendment to the just compensation remedy if the court invalidates that decision and concludes it has worked an "interim" taking of property. His remedy, as indicated by the Court of Appeal, is to file "an action for administrative mandamus before, or in conjunction with, its claim for inverse condemnation."[7] Pet. at A-22. If, however, he fails or elects not to pursue such a challenge, then the agency's land use decision is res judicata on any later collateral claim, including one for inverse condemnation.[8]

7. For example, in this case the trial court sustained respondents' demurrers to several causes of action in the complaint seeking interim damages arising from the Commission's decision conditionally approving Quaker's Mulholland property. Since Quaker had timely challenged that adjudicatory decision in a separately filed suit in administrative mandamus, the court permitted Quaker to simply add its damage causes of action by way of amendment to that suit. Jt. App. #5.

8. The citation by amicus Griffin Homes, Inc., to this Court's recent decision in Presault v. I.C.C., __U.S.__, 58 U.S.L.W. 4193 (1990), is well off the mark. Presault did not involve an attack on adjudicatory action, a claim for interim damages based on an asserted "temporary taking," or application of well-established principles of res judicata. It concerned a

In this case, the best that can be said about Quaker is that it simply sat on its rights. Nothing prevented Quaker from timely challenging the conditions placed on its coastal permit approval, and thus preserving its ability to secure interim damages in the event that decision was invalidated on taking grounds. Instead, as to its "Piuma" permit, Quaker accepted its permit and the benefits afforded thereby and complied with the conditions of approval, and gave absolutely no indication to government until over four years after the Commission's decision that it was dissatisfied with the decision or the conditions imposed. Since Quaker simply bypassed the

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challenge to the facial constitutionality of a provision of the so-called "rails-to-trails" statute. The Court reaffirmed the long-standing rule that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided in the Tucker Act." Id. at 4196. Under the Tucker Act, the Court pointed out that "[i]f there is a taking," it is "within the jurisdiction of the [Claims Court] to hear and determine." Id. Since the petitioners in Presault failed to make use of the available Tucker Act remedy, the Court found their taking claim to be premature. Id. at 4197. It would require a remarkable extension to read the case, as Griffin Homes does, to state that, as to federal liability, one must seek just compensation first in the Court of Claims, and then later a determination of invalidity. The case merely holds that as a matter of federal procedure, a compensable taking claim must be pursued in the Claims Court, and not, as there, in the Court of Appeal on appeal from a decision of the ICC.

California has no counterpart to the Tucker Act. "Temporary taking" claims are heard and determined in the superior court. In the case of adjudicatory administrative action, interim damages are properly pursued by filing a claim for inverse condemnation in conjunction with, or after, an action for administrative mandamus.

mandate remedy, the Court of Appeal correctly concluded that, apart from waiver, Quaker is foreclosed, under well established state court procedures and principles of res judicata, from belatedly attempting to collaterally attack the Commission's decision through damage causes of action.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

DATED: March 16, 1990.

Respectfully submitted,

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STATE OF CALIFORNIA
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I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On March 19, 1990, I served the within Respondents' Brief in Opposition in re: "Rossco Holdings Inc. vs. State of California, California Coastal Commission" in the United States Supreme Court, October Term, 1989, No. 89-1314, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 19, 1990, at Los Angeles, California.

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